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83 - 1871

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

* * *

NO.

* * *

JOHNNY MITCHELL
Petitioner

v.

DONALD WYRICK
Respondent

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

* * *

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76 HP

QUESTION PRESENTED

1. Whether the claim of a habeas corpus petitioner that he received ineffective assistance of counsel in state post-conviction proceedings is cognizable under 28 U.S.C. § 2254.

INDEX

Page

Opinion Below.....2
Jurisdiction.....2
Constitutional and statutory provisions.....2
Statement of the case.....6
Reason for granting the writ.....14
Conclusion.....31
Magistrate Review and Recommendation.....A-1
District Court opinion.....A-7
Eighth Circuit opinion.....A-9
Missouri Supreme Court Rule 27.26.....A-17
Transcript of portion of hearing on Petitioner's state motion for post-conviction relief.....A-29

CITATIONS

CASES:

Anders v. State of California, 386 U.S. 738 (1967).....19
Burns v. State of Ohio, 360 U.S. 252 (1959).....20
Douglas v. People of the State of California, 372 U.S. 353 (1963).19

CITATIONS
(Continued)

Page

Entsminger v. State of Iowa,
286 U.S. 748 (1967).....19
Griffin v. People of the State of
Illinois, 351 U.S. 12 (1956)....15
Lane v. Brown, 372 U.S. 477 (1963)...23
Long v. District Court of Iowa,
385 U.S. 192 (1966).....23
State v. Mitchell, 611 S.W. 2d 223
(Mo. banc 1981).....7
Smith v. Bennett, 365 U.S. 708
(1961).....20

OTHER:

28 U.S.C. § 2254.....8,30
Missouri Supreme Court Rule 27.26.....5

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. _____

JOHNNY MITCHELL, Petitioner

v.

DONALD WYRICK, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petitioner Johnny Mitchell respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit rendered herein on February 17, 1984.

OPINION BELOW

The opinion of the Eighth Circuit, and the District Court opinion which it affirms, appear in the Appendix hereto.

JURISDICTION

The opinion of the Eighth Circuit was entered on February 17, 1984, and this petition for certiorari was filed within 90 days of said date. Jurisdiction in this Court is predicated on 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where-

in they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

***

United States Code, Title 28:

§ 1254. Courts of Appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

***

United States Code, Title 28:

§ 2254. State custody; remedies in Federal courts.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Consti-

tution or laws or treaties of the United States.

***

Missouri Supreme Court Rule 27.26.

[Appears in Appendix hereto.]

STATEMENT OF THE CASE

Procedure:

Petitioner was charged by information in the Circuit Court of Pemiscot County, Missouri, with two counts of capital murder. The case went to trial on October 10, 1979, before a jury in Cape Girardeau County on a change of venue. Petitioner was found guilty by the jury on both counts. In the punishment phase of the proceedings, the jury was unable to agree as to the appropriate sentence on either count. The trial court, pursuant to Missouri procedure, therefore assessed the punishment: two life sentences to be served concurrently, without the possibility of parole for fifty years.

Petitioner's conviction was affirmed on his appeal to the Missouri Supreme Court. See State v. Mitchell, 611 S.W. 2d 223 (Mo. banc 1981). On May 7, 1981, Petitioner filed a state habeas corpus petition, pursuant to Missouri Supreme Court Rule 27.26, to vacate his two capital murder convictions. Petitioner alleged therein that he had, for various reasons, received ineffective assistance of counsel from his trial counsel, the Public Defender for the 34th Judicial Circuit.

Following an evidentiary hearing on said petition on January 15, 1982, Petitioner's 27.26 motion was denied on March 29, 1982, upon a finding that Petitioner had received effective legal counsel at

trial. Petitioner was represented at the time of the 27.26 hearing by Gary L. Robbins, Public Defender for the 32nd Judicial Circuit. Mr. Robbins thereafter filed a notice of appeal of the denial of Petitioner's 27.26 motion with the Missouri Court of Appeals, Eastern District. The Missouri Appellate Court, following prior notice of such action to Petitioner, subsequently dismissed his 27.26 appeal for failure to file the record as required by Missouri Rule 81.18.

Petitioner's federal habeas corpus petition, grounded on 28. U.S.C. § 2254 and alleging ineffective assistant of counsel by the Public Defender representing him on his 27.26 motion, followed such dismissal.

United States Magistrate William S. Bahn was appointed to consider the petition, and on April 21, 1983, recommended that Petitioner's application for habeas corpus relief be denied. On July 21, 1983, the Magistrate's Report and Recommendation was accepted by the United States District Court, Eastern District of Missouri. On February 17, 1984, the District Court order was affirmed by the United States Court of Appeals for the Eighth Circuit.

Facts:

Petitioner and one Willie Turner were originally co-defendants on the charge of capital murder of two men in a tobacco store in Caruthersville, Missouri. The offense

occurred on December 20, 1978. The charges against Petitioner and Turner were subsequently severed. Gary L. Robbins represented Turner at trial, and Blair Buckley represented Petitioner at trial. Turner was convicted of the charges as well.

Mr. Robbins subsequently represented Turner on his appeal. At the time of Petitioner's 27.26 hearing, that appeal had proceeded through the Missouri Supreme Court, and Mr. Robbins was in the process of seeking a writ of certiorari to the United States Supreme Court. Robbins' defense of Turner at trial and on appeal was that Petitioner, and not Turner, was the person who killed the two victims. (The two were apparently slain in the course of a robbery

of the store.) His defense rested to a greater or lesser extent on the testimony of one Michael Cooper, whose testimony indicated that Petitioner confessed to him that he had killed the two.

Mr. Robbins was, of course, the appointed counsel for Petitioner's 27.26 motion as well. The motion was drawn and filed by Petitioner apparently without the benefit of counsel. Robbins declined to amend the motion following his appointment subsequent to the filings. One allegation of ineffective legal counsel at trial raised in Petitioner's state motion was that his trial counsel had failed to impeach the damaging testimony of Michael Cooper by establishing that Cooper had re-

ceived a sum of money as a reward and that his testimony was influenced thereby.

At Petitioner's state 27.26 hearing, then, Robbins was put in the position of being forced to attempt to impugn the testimony of Cooper, while advancing the credibility of Cooper in the simultaneous Turner proceedings. Robbins' stance in the Turner case was well known to the 27.26 judge, whom Robbins was attempting to convince of the validity of said state habeas corpus motion.

Robbins attempted to withdraw as counsel for petitioner prior to the 27.26 hearing; his motion to withdraw was denied by the court.

Petitioner's habeas corpus petition alleged that he received ineffective assistance of counsel in his state post-conviction proceedings because of his appointed counsel's necessary conflict of interest, or the necessary conflict in his legal position, before the state court.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH APPLICABLE DECISIONS OF THIS COURT.

Both the Eighth Circuit and the District Court stated that claims of ineffective assistance of counsel in state post-conviction proceedings are not cognizable in a federal habeas corpus action.

Petitioner acknowledges that there is no Constitutional requirement that the states provide post-conviction review of their convictions of criminal defendants. Petitioner does not find that fact of particular import, however. The state of Missouri has made provision both for direct

and collateral post-conviction procedures and for appointed counsel at same. It is Petitioner's contention that in view of such provision he is entitled by the due process and equal protection clause of the Fourteenth Amendment to adequate legal counsel in those proceedings.

In support of the contention, Petitioner relies on Griffin v. People of the State of Illinois, 351 U.S. 12 (1956), and its progeny. In Griffin, the issue was the propriety of the state's denial to Griffin of a transcript of the trial proceeding, at its cost, so that he could perfect the appeal of his convictions. The Supreme Court held that such denial constituted a violation of Griffin's Fourteenth Amend-

ment constitutional rights. The Court expressly recognized that the states are not required by the federal Constitution to provide appellate review of their convictions. However, the Court continued:

> "But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations . . . [T]o deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions ..."

Id., 18 - 19.

Similarly, Missouri is not required by the federal Constitution to provide the state habeas corpus remedy. It has undertaken to do so, however. In executing its statutory provisions in that regard, Missouri is precluded by the due process and equal protection clauses from imposing "invidious discrimination" on any segment of its citizenry invoking that remedy. It would be such "invidious discrimination" if the indigent prison populace were not guaranteed the same safeguards in pursuing that remedy--including inter alia, adequate representation--as was the wealthy.

Since Petitioner is seeking relief on due process and equal protection grounds, it is immaterial that the error alleged

occurred in the collateral, nominally civil, post-conviction, rather than appellate stage. It is a meaningless distinction in this context and does not constitute grounds for distinguishing Griffin. The Rule 27.26 proceedings have become "an integral part of the [Missouri] trial system for finally adjudicating the guilt or innocence of a defendant." The Court in Griffin, at 18 recognized that:

> "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance."

Griffin spawned a number of cases which held that a defendant convicted in a state court has a constitutional right to

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the appointment of counsel--who are obligated to provide adequate legal assistance --on the appeal of those convictions. See Douglas v. People of the State of California, 372 U.S. 353 (1963); Anders v. State of California, 386 U.S.738 (1967); Entsminger v. State of Iowa, 386 U.S. 748 (1967).

The principle espoused in Griffin has not been limited in application only to those situations in which an unconstitutional barrier to relief was alleged in the convicted party's direct appeal. The Supreme Court has found in error a number of state court rulings which would permit the imposition of financial barriers restricting the availability of relief for the

indigent in collateral state court matters as well. Smith v. Bennett, 365 U.S. 708 (1961), was decided on certiorari from a decision of the Iowa Supreme Court affirming a lower state court denial to the petitioners of the right to file state nabeas corpus petitions without payment of the $4 filing fee. As indigents, they were unable to make such payment. The Court reversed that ruling on Fourteenth Amendment grounds.

The Court disposed of the state's argument that Griffin and similar cases, e.g. Burns v. State of Ohio, 360 U.S.252 (1959), would not avail the petitioners because those cases were concerned with the rights of a convicted criminal in the pro-

cess of directly attacking his conviction on appeal, while Smith involved a collateral challenge thereto. The Court found that insufficient ground to distinguish.

> "While habeas corpus may, of course, be found to be a civil action for procedural purposes, Ex parte Tom Tong, 1883, 108 U.S. 556, 2 S.Ct. 871, 27 L.Ed. 826, it does not follow that its availability in testing the State's right to detain an indigent prisoner may be subject to the payment of a filing fee. The State admits that each petitioner here is an indigent and that its requirement as to the $4 fee payment has effectively denied them the use of the writ...In Iowa, the writ is a post-conviction remedy available to all prisoners who have $4. We shall not quibble as to whether in this context it be called a civil or criminal action for, as Selden has said, it is 'the highest remedy in law, for any man that is imprisoned.' 3 Howell's State Trials 95 (1628). The availability of a procedure to regain

liberty lost through criminal process cannot be made contingent upon a choice of labels. Ever since the Magna Charta, man's greatest right--personal liberty--has been guaranteed, and the procedures of the Habeas Corpus Act of 1679 gave to every Englishman a prompt and effective remedy for testing the legality of his imprisonment. Considered by the Founders as the highest safeguard of liberty, it was written into the Constitution of the United States that its' privilege *** shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.' Art. 1 § 9. Its principle is imbedded in the fundamental law of 47 of our States. It has long been available in the federal courts to indigent prisoners of both the State and Federal Governments to test the validity of their detention. Over the centuries it has been the common law world's 'freedom writ' by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration

> inquired into, failing which the prisoner is set free. We repeat what has been so truly said of the federal writ: 'there is no higher duty than to maintain it unimpaired,' Bowen v. Johnston, 1939, 306 U.S. 19, 26, 59 S.Ct. 442, 446, 83 L.Ed. 455, and unsuspended, save only in the cases specified in our Constitution. When an equivalent right is granted by a State, financial hurdles must not be permitted to condition its exercise."
>
> * * *
>
> ". . . [T]he operation of the statues under attack has, perhaps inadvertently, made it available only to those persons who can pay the necessary filing fees. This is what it cannot do."

Id., at 712 - 14.

Smith was followed by, inter alia, Lane v. Brown, 372 U.S. 477 (1963); and Long v. District Court of Iowa, 385 U.S. 192 (1966).

Lane held invalid a state procedure under which an appeal from the denial of a writ coram nobis could be perfected only by filing a transcript in the appellate court, when it was within the public defender's exclusive discretion whether or not to request that a free transcript be prepared. The Court, after discussing the Griffin, Burns, and Smith cases, stated, at 484, that the Court in Smith

> "made clear that these principles were not to be limited to direct appeals from criminal convictions, but extended alike to state postconviction proceedings. 'Respecting the State's grant of a right to test their detention,' the Court said, 'the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each.' Id., at 714, 81 S.Ct. 898.

* * *

> "The present case falls clearly within the area staked out by the Court's decisions in Griffin, Burns, Smith and Eskridge [357 U.S. 214]. To be sure, this case does not involve, as did Griffin, a direct appeal from a criminal conviction, but Smith makes clear that the Griffin principle also applies to state collateral proceedings..."

In Long, an indigent state prisoner requested a free transcript of his state habeas corpus hearing to perfect the appeal of the denial of the petition. The transcript was denied. On certiorari, the Supreme Court held that denial to be a violation of the prisoner's Constitutional right to equal access to the habeas corbus remedy. (The lower state court had denied the request for the transcript on the ground that habeas corpus was a civil action. Long, 385 U.S. at 292.) The Court stated:

"The State properly concedes that under our decisions in Smith v. Bennett, ... and Lane v. Brown, ...'to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws.' Smith v. Bennett, supra, 365 U.S. at 709 6 L.Ed. 2d at 40. We specifically held in Smith that having established a post-conviction procedure, a State cannot condition its availability to an indigent upon any financial consideration. And we held in Lane that the same rule applies to protect an indigent against a financial obstacle to the exercise of a state-created right to appeal from an adverse decision in a post-conviction proceeding.

"In Lane v. Brown, supra, at 483, the Court reaffirmed the fundamental principle of Griffin v. Illinois, ... that 'Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.' The Court in Lane went on to observe that Smith had established 'that these principles were not to be limited

> to direct appeals from criminal convictions, but extended alike to state postconviction proceedings.'"

Id., at 292-93.

The common theme of all of the above cases is that due process and equal protection requirements are satisfied only if state post-conviction remedies, whether direct or collateral, are equally available to all, regardless of their financial status. Douglas, supra, struck down a denial of counsel on a appeal of a conviction. Anders, supra, stated the axiomatic principle that "counsel" in those circumstances refers to competent, adequate representation. Smith, Lane, and Long hold that such principles are equally valid when the state relief sought by a

convicted defendant is collateral as well.

(This Court, by granting petitioner the relief requested, need not view it as a decision that all civil litigants are entitled to gratuitous competent legal representation. Habeas corpus is, at most, a civil remedy in name only. As the Court in Smith pointed out, it is a vital remedy, indeed, the last resort, for a convicted prisoner's vindication of his Constitutional rights. Under those circumstances, the Court found the "civil" label an anomaly which could not be applied to preclude the invocation of the Griffin principle in such case. Moreover, Missouri clearly does not view its state habeas corpus remedy as a civil matter: its Rule 27.26 is found amid its Rules of Criminal

Procedure. In any event, as the Smith Court noted, 365 U.S. at 713,:

> "To require the State to docket applications for the post-conviction remedy of habeas corpus by indigent prisoners without the fee payment does not necessarily mean that all habeas corpus or other actions involving civil rights must be on the same footing. Only those involving indigent convicted prisoners are involved here and we pass only upon them.")

On the substantive question of the quality of Petitioner's legal representation at his 27.26 hearing, Petitioner directs the Court's attention to Anders, supra, wherein counsel acting as amici curiae rather than advocates for his client was chastised by the Court. Because of the conflict of interest, because Mr. Robbins was forced to try to convince a judge of a proposition contrary to that which he had

previously taken in that court, he could not hope to be more than an amicus to the court. He could present his argument in exemplary fashion, but this was not a law-school exercise. It was a flesh-and-blood attempt to change a man's mind, and it is extremely doubtful that Mr. Robbins could have been the least bit convincing under the circumstances. The situation was not of his making, but the situation existed and it demands redress.

Under 28 U.S.C. § 2254, habeas corpus relief is to be granted if a state prisoner is in custody "in violation of the Constitution or laws or treaties of the United States." Such relief is appropriate in this case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

ALAN J. AGATHEN,
230 South Bemiston
St. Louis, Missouri 63105
(314) 721-8033
Council for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JOHNNY MITCHELL,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 82-1552c(2)
	)	
	)	
DONALD WYRICK, et al.,	)	
	)	
Respondents.	)	

MAGISTRATE'S REVIEW AND RECOMMENDATION

Johnny Mitchell has filed an application for federal habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has been convicted of two counts of capital murder in Cape Girardeau County, Missouri and punishment was fixed at two consecutive terms

of life imprisonment without eligibility for parole for fifty years. The state court conviction is cited at State v. Mitchell, 611 S.W.2d 223. The respondent concedes custody of the petitioner and summarily requests dismissal because he states that Mitchell fails to state a claim cognizable in federal court. Specifically, he states that a claim of ineffective representation of counsel in a state post-conviction proceeding does not give rise to a cause of action in § 2254.

In his federal application, Mitchell states two grounds to support his claim. He states that he was denied effective assistance of counsel during his Rule 27.26

proceedings, because his appointed attorney had represented the co-defendant who was prosecuted and convicted for the same set of offenses, under the same set of facts, as petitioner. Mitchell finds this arrangement particularly offensive because the co-defendant's defense asserted at trial, was that Mitchell was the guilty party and did the shooting in question. He further states that the attorney was ineffective because he failed to consult with him concerning amendment of the 27.26 petition.

Up front, we observed that federal courts give no aid to § 2254 claimants to entitlement of counsel that satisfies them in state post-conviction proceedings. These are civil proceedings not covered by

the Sixth Amendment, which applies only during the pendency of the criminal case. Noble v. Sigler, 351 F.2d 678 (8th Cir. 1975). There is no federal requirement that the states provide post-conviction review of their own convictions. Applications for federal habeaus do not serve as an additional appeal from state court convictions.

Mitchell is presently represented by counsel, who filed the instant application. In fairness to Mitchell's position, we note that his appointed § 27.26 attorney, a state public defender, made enthusiastic objection to representing Mitchell under the circumstances. He observed and beseeched the circuit court judge for relief.

He claimed his representation of the co-defendant in this particular case made his position, at best, uncomfortable. The trial judge denied the application for relief. The adverse results of Mitchell's § 27.26 hearing were not appealed to the Missouri Court of Appeals. The conflict of interest issue was well preserved and might well have been aired on appeal, but was not. However, we are not obligated to reach the exhaustion issue because of the reasons heretofore outlined. Deliberate by-pass would, of course, void Mitchell's right to bring the instant action. Fay v. Noia, 372 U.S. 91 (1963).

Mitchell has not requested, and there is no reason to grant him a hearing in the

federal district court. The law surrounding these particular facts is transpicously clear. Mitchell's application for federal habeas should be DENIED, without further proceedings.

The parties are hereby advised that they have ten days from the service of this recommendation within which to file objections to same, pursuant to 28 U.S.C. § 636(b). Failure to object could bar any appeal.

/s/ William S. Bahn

UNITED STATES MAGISTRATE

Dated: April 21, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JOHNNY MITCHELL	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 82 1552C(1)
	)	
DONALD WYRICK, et al.,	)	
	)	
Respondents.	)	

ORDER

Upon consideration of the record, the Magistrate's report and recommendation, and the objections thereto,

IT IS HEREBY ORDERED that the report and recommendation of the Honorable William S. Bahn, United States Magistrate, be and is accepted. There is no constitutional right to counsel in post-conviction proceedings. Furthermore, infirmities in a

state's post-conviction remedial procedure do not give rise to cause of an action under section 2254. Noble v. Sigler, 351 F.2d 673 (8th Cir. 1965).

IT IS FURTHER ORDERED that the petitioner's application for a writ of habeas corpus be and is denied and this case be and is dismissed.

/s/ John F. Nangle

UNITED STATES DISTRICT JUDGE

Dated: July 21, 1983

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Mo. 83-2096

JOHNNY MITCHELL,	*	
	*	Appeal from the
Appellant,	*	United States
	*	District Court
v.	*	for the Eastern
	*	District of
DONALD WYRICK,	*	Missouri
	*	
Appellee.	*	

Submitted: February 14, 1984

Filed: February 16, 1984

Before ROSS, McMILLIAN and FAGG, Circuit Judges.

PER CURIAM.

Johnny Mitchell appeals from a final

order of the District Court[1] for the Eastern District of Missouri dismissing his petition for habeas corpus pursuant to 28 U.S.C. § 2254. For reversal appellant argues that the district court erred in holding that (1) he failed to exhaust available state remedies and (2) his claim of ineffective assistance of counsel during state post-conviction remedy proceedings was not cognizable under § 2254. For the reasons discussed below, we affirm.

Appellant was convicted of two counts of capital murder in Missouri state court

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[2] The Honorable John F. Nangle, Chief Judge, United States District Court for the Eastern District of Missouri.

and sentenced to two consecutive life sentences without possibility of parole for fifty years. The Missouri Supreme Court affirmed the convictions on appeal. State v. Mitchell, 611 S.W.2d 233 (Mo. 1981) (en banc). Appellant then filed a motion for postconviction relief under Mo. R. Crim. P. 27.26 alleging that the public defender appointed to represent him at trial was ineffective in failing to impeach an important state witness, Michael Cooper. The circuit court appointed Gary Robbins, Public Defender for the 34th Judicial Circuit, to represent appellant on his Rule 27.26 motion.

At the beginning of the Rule 27.26 evidentiary hearing, Robbins requested

leave to withdraw as appellant's counsel because of a conflict of interest. Robbins explained that he was trial counsel for Willie Turner, who was charged with committing the same murders as appellant but was tried in a separate proceeding. Robbins' position at trial and in subsequent proceedings was that appellant alone had committed the murders based on the testimony of Michael Cooper. Robbins reasoned that he could not properly continue to argue Turner's innocence on the basis that Cooper was telling the truth and simultaneously argue that appellant's trial counsel was ineffective in failing to establish that Cooper was lying. The circuit court denied Robbins' request to withdraw.

After receiving testimony on appellant's claim, the circuit court found that appellant was not denied effective assistance of counsel at trial.

Robbins filed a notice of appeal on appellant's behalf and withdrew from the case because appellant had retained counsel on appeal. The Missouri Court of Appeals eventually dismissed the appeal for failure to prosecute. Apellant then filed the instant habeas corpus petition claiming that Robbins' conflict of interest denied him effective assistance of counsel at his Rule 27.26 hearing.

Habeas corpus is available to a state

prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Thus, § 2254 gives federal courts jurisdiction to determine the constitutionality of a state criminal conviction, but does not authorize review of state postconviction relief proceedings. "Even where there may be some error in state post-conviction proceedings, this would not entitle appellant to federal habeas corpus relief since appellant's claim here represents an attack on a proceeding collateral to detention of appellant and not on the detention itself..." Williams v. Missouri, 640 F.2d 140, 144 (8th Cir.) cert. denied, 451 U.S. 990 (1981). Moreover, because state postcoviction proceed-

ings are civil in nature, the sixth amendment right to effective assistance of counsel does not attach. Id.; Noble v. Sigler, 351 F.2d 673, 678 (8th Cir. 1965), cert. denied, 385 U.S. 853 (1966). Therefore, appellant's claim that he was denied effective assistance of counsel at his Rule 27.26 hearing is not cognizable under § 2254.

Accordingly, the judgment of the district court is afirmed.[2] See 8th Cir. R. 12(a).

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[2] Because of our disposition of this case, it is not necessary to determine whether apellant exhausted his available state remedies.

A true copy.

ATTEST

CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT

SUPREME COURT RULES

RULES OF CRIMINAL PROCEDURE

Rule 27.26 Felonies - Sentence Unlawful - Motion to Vacate or Correct Form and Scope of Motion - Notice to Prosecuting Attorney - Appointment of Counsel - Hearing - Order - Effect of Order - Appeal

A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of this state or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence

authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside, or correct the same. The following procedure shall be applicable to motions filed pursuant to this Rule:

(a) Nature of Remedy. This Rule is intended to provide the exclusive procedure which shall be followed when a prisoner in custody seeks relief on the basis of any of the attacks on a sentence enumerated above. The motion seeking such relief shall be filed in the court where the sentence was imposed. This Rule does not suspend the rights available by habeas corpus but rather prescribes the procedure to be followed

in seeking the enforcement of those rights. It includes all relief heretofore available in any court by habeas corpus when used for the purpose of seeking to vacate, set aside or correct a sentence, plus relief not available by habeas corpus. A motion filed hereunder is an independent civil action which should be separately docketed. The procedure before the trial court and on appeal is governed by the Rules of Civil Procedure insofar as applicable. No cost deposit shall be required.

(b) When Remedy May be Invoked.

(1) The provisions of this Rule may be invoked only by one in custody,

claiming the right to have a sentence vacated, set aside or corrected.

(2) A motion to vacate, set aside, or correct a sentence cannot be maintained while an appeal from the conviction and sentence is pending or during the time within which an appeal may be perfected.

(3) A proceeding under this Rule ordinarily cannot be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors are to be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal.

(c) Form and Sufficiency of Motion. A motion to vacate a sentence must be submitted on a form substantially in compliance with the form appended hereto. The motion shall include every ground known to the prisoner for vacating, setting aside, or correcting his conviction and sentence. The prisoner shall verify the correctness of the motion, including the fact that he has recited all claims known to him.

(d) Successive Motions. The sentencing court shall not entertain a second or successive motion for relief on behalf of the prisoner where the ground presented in the subsequent application was raised and determined adversely to the applicant

on the prior application or where the ground presented is new but could have been raised in the prior motion pursuant to the provisions of subsection (c) of the Rule. The burden shall be on the prisoner to establish that any new ground raised in a second motion could not have been raised by him in the prior motion.

(e) Hearing. As soon as a motion hereunder is received by the circuit clerk, he shall notify the prosecuting attorney and transmit a copy thereof to him. If appointment of counsel is required under (h) of this Rule, such counsel shall be appointed immediately and a copy of the motion transmitted to him. Unless the

motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, a prompt hearing thereon shall be held. "Prompt" means as soon as reasonably possible considering other urgent business of the court. This hearing shall be evidentiary hearing if issues of fact are raised in the motion, and if the allegations thereof directly contradict the verity of records of the court, that issue shall be determined in the evidentiary hearing. All proceedings on the motion shall be recorded by the official court reporter.

(f) Burden of Proof. The prisoner has the burden of establishing his grounds for relief by a preponderance of the evidence.

(g) Presence of Prisoner. The prisoner shall be produced at any evidentiary hearing on a motion attacking a sentence where there are substantial issues of fact.

(h) Right to Counsel. When an indigent prisoner files a pro se motion, the court shall immediately appoint counsel to represent the prisoner. Counsel shall be given a reasonable time to confer with the prisoner and to amend the motions filed hereunder if desired. Counsel shall have the duty to ascertain from the prisoner the facts supporting the grounds asserted in the motion and if those facts are not sufficiently stated in the motion, counsel shall file an amended motion. Counsel also shall ascertain from the prisoner whether he has included all grounds known to him as

a basis for attacking the judgment and sentence and, if not, shall file an amended motion which also sufficiently alleges any additional grounds and the facts in support thereof. If, for good cause shown, appointed counsel is permitted to withdraw, the trial court shall appoint new counsel to represent the indigent defendant.

(i) Judgment. The court shall make findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment

subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(j) Appeal. An order sustaining or overruling a motion filed under the provisions of this Rule shall be deemed a final judgment for purposes of appeal by the prisoner or by the state. An appeal may be taken from the order entered on the motion as in civil case as authorized by Section 512.020, RSMo. Appellate review shall be limited to a determination of whether the findings, conclusions, and judgment of the trial court are clearly erroneous.

(k) Costs. If the trial court finds that a prisoner desiring to appeal is an indigent person, it shall authorize an appeal in forma pauperis and furnish without cost the transcript of such proceeding for appellate review. The trial court, when the appeal is taken, shall order the official court reporter to prepare the transcript promptly. If the trial court finds adversely to a prisoner on the issue of indigency, it shall certify and transmit to the appellate court a transcript of the evidence on that issue only so as to permit review of that issue by the appellate court.

(l) Counsel on Appeal. If a prisoner desires to appeal and contends he is with-

out means to employ counsel to perfect the appeal, the trial court, if satisfied that the prisoner is an indigent person, shall appoint competent counsel to conduct such appeal. Such counsel, may, in the discretion of the court, be the same counsel who represented the prisoner in the trial court on said motion. If, for good cause shown, appointed counsel is permitted to withdraw, the trial court shall appoint new counsel in his stead.

(Adopted June 13, 1979, effective January 1, 1980.)

On the 15th day of January, 1982, the above-entitled and numbered cause came on for hearing in the Circuit Court of Cape Girardeau County, Missouri, before the HONORABLE STANLEY R. GRIMM, Judge, Division I.

The Movant appeared in person and was represented by MR. GARY L. ROBBINS, Public Defender, 32nd Judicial Circuit, Jackson, Missouri.

The Respondent was represented by MR. MICHAEL B. HAZEL, Prosecuting Attorney, Pemiscot County, Missouri.

The following proceedings were had and entered of record:

THE COURT: Are you Johnny Mitchell?

THE MOVANT: Yes, sir.

THE COURT: And you are here this morning with your attorney, Gary Robbins, is that correct?

THE MOVANT: Yes, sir.

THE COURT: And the State is present by the Prosecuting Attorney of Pemiscot County, Mike Hazel. Is there anything preliminarily for the Movant, Mr. Robbins?

MR. ROBBINS: Yes, Your Honor, I think there are several things that need to be taken up.

THE COURT: All right, you may proceed.

MR. ROBBINS: First, Your Honor, I believe at an earlier date in this matter there was request made to the Court regarding my representation in this case. I would like to speak to that briefly.

The Court filed a memorandum indicating that I would continue in the case; however, there is some information that needs to be made of record regarding the feasibility and the question of whether it is proper that I should act in an attorney capacity for Johnny Mitchell.

Specifically, I would like to indicate to the Court that the Court is well aware

that I was the attorney who represented Willie Turner, who was a companion case with this. That Willie Turner was convicted of the same charge as Johnny Mitchell and, in fact, was sentenced to the Missouri State Penitentiary under the same sentence. However, the difference comes in that in Willie Turner's case my defense which I proposed and furthered was that Willie Turner was in fact not the person who killed Mr. Parker and Mr. Neeley; that Johnny Mitchell was; that it is the matter I have taken through the Missouri Supreme Court, and as of the last ten days I have filed a writ with the United States Supreme Court furthering my pronouncement that Johnny Mitchell was in fact the man who

killed the two victims, and not Willie Turner.

I didn't have to mention this to Johnny Mitchell. He was aware of it, and he discussed it with me and said that he doesn't think that I am the proper person to be handling it because in this proceeding what we would be indicating is that one of the witnesses, Michael Cooper, which is a question of his appearance today, we have to take up, testified that Johnny Mitchell, in fact, did it; that he killed the two people, and that is the person that now I am to attempt to show that Michael Cooper was either influenced improperly by money or whatever and was not telling the truth.

I don't think it is proper, especially if you look at it from the viewpoint of Johnny Mitchell that I should act in his case as his attorney due to my conflicts that I think are paramount in this case.

In addition, the Missouri Public Defender's Association has taken the position that Public Defenders--this has been made known throughout the State--should not handle 27.26's of this nature, specifically when we have another Public Defender who is Blair Buckley, who was the counsel for Johnny Mitchell in his trial. What we have in essence is one public defender being required to attack another public defender, who they have a personal relationship, and I feel that is improper.

For those reasons, Judge, I think that it would be improper for me to proceed. The appearance of impropriety is too great as the attorney of record in this case for Johnny Mitchell, and that some other attorney, without the appearances and without the conflicts, should be appointed.

THE COURT: Let me just make a few comments in response, which I have previously indicated to Mr. Robbins in previous discussions with him. Taking his last question first, as he mentioned, I entered an order in this case on June 12, 1981, denying the request for him to be excused in this particular case and I set out some reasons in that particular order. I don't think any attorney ever likes to

attack another attorney, and the only reason we are talking about Mr. Robbins being unhappy attacking Mr. Buckley is because they both happen to be Public Defenders. Well, even more importantly that that, they are attorneys. But they are also sworn to uphold their client's position, so he has to do whatever he can to help out Mr. Mitchell in this particular case, and so I don't find that a particular reason. I think Mr. Robbins and the other Public Defenders are certainly aware of the fact that they have taken the position in the City of St. Louis and the County of St. Louis that they are even going to divide up the offices within those particular counties so that they will not have the conflicts that have been arising. And cer-

tainly we have a situation here where Mr. Robbins is the Public Defender in Cape Girardeau County, some 100 miles away from Caruthersville, where Mr. Buckley is the Public Defender; and although they both work for the State of Missouri, as do I, I don't feel that that makes any difference as far as their both being Public Defenders.

As to the other part of his comments concerning the fact that he did represent Willie Turner, I am pointing out that what we are here for today is a 27.26 Motion, wherein specific allegations are set forth, and I find nothing in those specific allegations that is in conflict with Mr. Robbins representing Mr. Mitchell. We are not

talking about two people going to trial on the criminal cause, merely on the 27.26 matter. Now you want to say something further, Mr. Robbins?

MR. ROBBINS: Your Honor, on the specific issue to which you are addressing yourself, the point is, in the Willie Turner case, which I am the counsel of record--hoping to be admitted to the United States Supreme Court--I am advancing the position that Michael Cooper, questionable witness at this hearing, was proper, did make correct statements when he said that Johnny Mitchell said: "I killed them." In this hearing I am now required to go the other way and say Michael Cooper was induced by whatever means, and, in fact, he

lied under oath; he perjured himself, whatever, and, in fact, those statements are not true. I don't see how I can advance both positions without having a conflict in this court or any court where I advance such position.

THE COURT: Well, I think that it is not unusual to set forth conflicting positions in cases, and I know that you have been very adept at doing that previously, and I don't think that there is any particular problem in that. Therefore, taking all of your comments as a renewing of your Motion to Withdraw, that motion is denied.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 1984 three copies of Petitioner's petition for writ of certiorari were mailed, U.S. mail, postage pre-paid, to John Ashcroft, Attorney General for the State of Missouri, Attention Michael Finkelstein, Post Office Box 899, Jefferson City, Missouri 65102, Attorney for Respondent. I further certify that all parties required to be served have thereby been served.

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